



COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND CABLE

TWO SOUTH STATION
BOSTON, MA 02110
(617) 305-3580
www.mass.gov/dtc

DEVAL L. PATRICK
GOVERNOR

TIMOTHY P. MURRAY
LIEUTENANT GOVERNOR

DANIEL O'CONNELL
SECRETARY OF HOUSING AND
ECONOMIC DEVELOPMENT

DANIEL C. CRANE
DIRECTOR OF CONSUMER AFFAIRS
AND BUSINESS REGULATION

SHARON E. GILLET
COMMISSIONER

November 14, 2008

Stacey L. Parker
Senior Director, Regulatory Affairs
Comcast Cable Communications, Inc.
12 Tozer Road
Beverly, MA 01915

Dear Ms. Parker:

On April 28, 2008, the Department of Telecommunications and Cable ("Department") issued a series of questions to Comcast for purposes of clarifying the regulatory status of Comcast's telephone services, in light of Comcast's pending completion of its transition from a circuit-switched telephone network platform to an Internet Protocol ("IP") network platform in Massachusetts. On May 12, 2008, Comcast responded by letter to the Department's questions, including providing the requested legal analysis supporting its position on jurisdiction issues.

In its May 12th Letter, Comcast asserted that with the discontinuance of its circuit-switched Digital Phone service in Massachusetts and the provision to all of its end-user customers (both existing and new) of an interconnected Voice over Internet Protocol ("VoIP") telephone service known as Comcast Digital Voice, it would no longer be subject to Department jurisdiction, under Massachusetts General Laws Chapter 159, as a telecommunications common carrier. Instead, Comcast believed it would be subject only to the jurisdiction of the Federal Communications Commission ("FCC") as an interconnected VoIP provider. Although it contended that its Digital Voice service, provided by an affiliate called Comcast IP Phone, LLC ("Comcast IP Phone"), is not subject to Department jurisdiction, including the Department's consumer protections set forth in Order D.P.U. 18448, Comcast stated that Comcast IP Phone will voluntarily comply with certain Department or state law requirements and consumer protections, including certain limited and, what appear to be, different billing and termination practices than those contained in D.P.U. 18448.

The Department has reviewed Comcast's May 12th Letter, including its legal analysis supporting its position that interconnected VoIP provided by Comcast IP Phone in Massachusetts is solely within the jurisdiction of the FCC. Based on this review and the Department's understanding of the current state of the law as it pertains to **fixed** VoIP, the type of interconnected VoIP that Comcast IP Phone provides (in contrast to **nomadic** VoIP, which is a markedly different type of service), the Department rejects Comcast's conclusion.

While the FCC and federal courts have ruled that states are preempted from regulating nomadic VoIP services, neither have ever held that regulation of **fixed** VoIP is subject to federal preemption. In a decision involving nomadic VoIP, the FCC decided that state regulation of nomadic VoIP services was preempted by federal law and policy because "the characteristics of [Vonage's nomadic VoIP service] preclude any practical identification of, and separation into, interstate and intrastate communications for purposes of effectuating a dual federal/state regulatory scheme." *In the Matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission ("Vonage Order")*, 19 FCCR 22404 ¶ 14 (November 12, 2004). On appeal, the Eighth Circuit upheld the *Vonage Order* and the FCC's rationale for preempting state regulation of nomadic VoIP services. *Minn. Pub. Utils. Comm'n v. FCC*, 483 F.3d 570 (8th Cir. 2007).

Notably, the Eighth Circuit specifically distinguished **fixed** VoIP service and concluded that preemption of state regulation of fixed VoIP services "remains an open issue." *Id.* at 583. That Court stated, "when VoIP is offered as a fixed service rather than a nomadic service, the interstate and intrastate portions of the service can be more easily distinguished." *Id.* at 575. Other courts and even the FCC have indicated that fixed VoIP services should be treated differently than nomadic VoIP. In *Comcast IP Phone of Missouri, LLC v. Mo. Pub. Utils. Comm'n*, 2007 WL 172359 (W.D. Mo. 2007), a Missouri federal court held that "the FCC has not preempted the entire field of VoIP services" and, accordingly, a state regulatory authority was legally permitted to determine whether a fixed VoIP service was subject to state regulation. Furthermore, the FCC itself has stated:

VoIP provider[s] with a capability to track the jurisdictional confines of customer calls would no longer qualify for the preemptive effects of our *Vonage Order* and would be subject to state regulation. This is because the central rationale justifying preemption set forth in the *Vonage Order* [the inseparability of inter- and intrastate calls] would no longer be applicable....

In the Matter of Universal Service Contribution Methodology, 21 FCCR 7518 ¶ 56 (June 27, 2006).¹

¹ We note that on November 5, 2008, the FCC issued an Order on Remand of its *ISP Remand Order*, a Report and Order on proposed reforms to the federal universal service fund, and Further Notice of Proposed Rulemaking concerning broader proposals to reform the intercarrier compensation and universal service systems. See *In the Matter of High-Cost Universal Service Support*, WC Docket No. 05-337, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Lifeline and Link Up*, WC Docket No. 03-109, *Universal Service Contribution Methodology*, WC Docket No. 06-122, *Numbering Resource Optimization*, CC Docket No. 99-200, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, *Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68, and *IP-Enabled Services*, WC Docket No. 04-36, Order on Remand, and Report and Order, and Further Notice of Proposed Rulemaking (rel. Nov. 5, 2008). None of these decisions in any way change current law, which gives the Department authority to regulate fixed VoIP services.

Because interstate and intrastate fixed VoIP calls can be distinguished, and because the FCC does not have jurisdiction over intrastate calls (see 47 U.S.C. § 153(22)), the Department has exclusive authority to regulate intrastate fixed VoIP communications within the Commonwealth, and is compelled by state statutory requirements and important public policy concerns to do so. With respect to the former, G.L. c. 159 imposes an obligation on the Department to regulate all telecommunications common carriage in Massachusetts. G.L. c. 159, Sec. 12. The standards for determining whether a telecommunications company is providing common carriage under G.L. c. 159 are set forth in *Complaint of CTC*, D.T.E. 06-87 (2007) (holding that for purposes of c. 159, Massachusetts will apply the FCC's test for common carriage); *Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921 (D.C. Cir. 1999) (outlining FCC's two-part test for common carriage); *Nat'l Ass'n of Regulatory Util Comm'rs v. FCC*, 533 F.2d 601, 607-09 (D.C. Cir. 1976) ("NARUC") (same). In order to qualify as a common carrier, a telecommunications carrier must 1) offer to serve all similarly situated customers interested in purchasing telecommunications services "indifferently" (i.e., on the same terms); and 2) permit customers to transmit content of their choosing over the provider's facilities. See *NARUC*, 533 F.2d at 608-09 (defining the second part of the test as permitting customers to "transmit intelligence of their own design and choosing"). In this case, the fact that Comcast offers its fixed VoIP service to the general public in Massachusetts is beyond dispute. Comcast is the largest cable provider in the Commonwealth and provides its fixed VoIP services to more than 220 cities and towns within Massachusetts. Likewise, Comcast satisfies the second part of the test by allowing its customers the ability to transmit voice communications of their choosing over Comcast's fixed VoIP network. Thus, under G.L. c. 159, Comcast's fixed VoIP Digital Voice service is being provided as common carriage and is by statute subject to the Department's regulatory authority, in the same way that all other intrastate telecommunications common carrier services are subject to the Department's jurisdiction.

Apart from fulfilling its statutory obligations, the Department's regulation of Comcast's fixed VoIP service serves two fundamental public policy objectives: first, the preservation of important consumer protections and just and reasonable services, and second, the maintenance of a level playing field for telecommunications competition in the Commonwealth.

With respect to the first objective, consumers buying a fixed telephone service are typically not very interested in or aware of the technical differences between VoIP and traditional circuit switched services, and they rightfully expect that both services will provide them with equivalent consumer protections and will be just and reasonable. Customers of telephone services regulated by the Department today rely on the Department to ensure that their phone service will be safe and reliable. With new competitors and technologies providing telephone service, now more than ever, consumers need the Department to protect them against unreasonable, unfair, deceptive, and anti-competitive practices, including (1) unjustified payments or disconnection over legitimate billing disputes; (2) extended service outages that can be life-threatening for sick and elderly citizens and can jeopardize the survival of small and medium-sized businesses that depend on telecommunications services to function; (3) disruption to or poor quality E911 service; (4) the loss of expected benefits, such as 10 free directory assistance phone calls (and more for the elderly); and (5) monopolistic practices in those areas of the state that may be served by a single provider using fixed VoIP technology. Consumers unequivocally need the ability to seek assistance from the Department in situations like these, where market forces alone will not protect them, and where, without Department intervention,

these citizens will suffer irreparable harm. These and other protections are particularly important to the Commonwealth's most vulnerable citizens, including those who are disabled, poor, or elderly. The Department believes that the consumer protections it is charged with enforcing are critical components of fixed telephone service, and that all customers in Massachusetts should have equal rights to these protections, regardless of the technology used to provide service in their community.

With respect to the second objective, the Department's long-standing regulatory framework for providers of telephone service applies based on traditional economic distinctions – how “dominant” the carrier is in the marketplace – not technological ones. Therefore, the application of existing common carrier regulations to fixed VoIP providers will merely continue regulatory policies already in place, and will not impose any price regulation on carriers not currently subject to it for economic reasons. Furthermore, the fixed telephone service market in Massachusetts currently features a mix of VoIP and circuit-switched technologies, not only across different providers but even within individual firms as they update their networks. If the Department were to not regulate fixed VoIP under Chapter 159, in the short term it would be tilting the competitive playing field unfairly based on technology. And in the long-term, the Department would be abandoning protection of fixed telephone service consumers under Chapter 159 altogether, since based on current industry trends it is not difficult to foresee the day when all fixed telephone service in Massachusetts, including that provided by the major incumbent provider, Verizon, will be delivered using VoIP technology. The Department does not believe that either of these outcomes would be consistent with its statutory obligations to regulate telecommunications in Massachusetts consistent with the public interest.

In conclusion, the Department determines that Comcast IP Phone's Digital Voice service is subject to the Department's jurisdiction under Chapter 159, and shall be regulated equivalently to Comcast's former Digital Phone service, as a non-dominant carrier that is *not* subject to retail price regulation, but *is* subject to all other requirements imposed on other non-dominant telecommunications common carriers, including the Department's consumer protections set forth in D.P.U. 18448. Accordingly, Comcast IP Phone is required to file a tariff and registration statement for its Digital Voice service within 30 days from the date of this letter.

Sincerely,

/s/

Michael A. Isenberg,
Director, Competition Division

cc: Sharon E. Gillett, Commissioner
Geoffrey Why, General Counsel
Karen Robinson, Director, Consumer Division